IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1960 of 2004
with
Civil Application No. 7071 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MAHADEVBHAI KHUSHALBHAI PATEL

Versus

MANISHKUMAR SURESHBHAI PATEL

Appearance:
1. First Appeal No. 1960 of 2004
MR JASHWANT SHAH for MR ASHISH M DAGLI for Appellants
MR YV VAGHELA for Respondent

CORAM : HON'BLE MR.JUSTICE A.M.KAPADIA

Date of decision: 27/01/2005

ORAL JUDGEMENT

1. Instant appeal under Section 47 of the Guardians and Wards Act, 1890 ('the Act' for short) is directed

against order dated 1.4.2004 rendered in Miscellaneous Guardian Application No.40 of 2003 by the learned Assistant Judge, Surat by which the application filed by the appellants under Section 7 of the Act for appointing them as guardian of female minor child "Bhakti", daughter of respondent, came to be rejected with costs.

2. The appellants/applicants who are husband and wife filed the above-numbered Misc. Guardian Application before the learned Assistant Judge, Surat under Section 7 of the Act seeking the relief of appointing them as guardian of respondent's minor female child Bhakti, inter alia, stating that the appellants have two sons namely, Deep and Kevin who are at present minor. The respondent had married one Dipaliben in the year 1988 and out of their wedlock one female child is born on 30.6.1999 who is named Bhakti. Her mother, i.e., wife of respondent, namely Dipaliben, passed away on 8.3.2003. According to the appellants, the appellants and respondent are relatives and the appellants have love and affection for the minor female child Bhakti from the very beginning as both the children of the appellants and Bhakti stay as brothers and sister. After demise of Dipaliben, wife of respondent, the children of the appellants and the child of respondent have also mixed with each other and there is great love and affection between the three children. Therefore, legal adoption was made on 2.4.2003 adopting the minor female child of respondent by the appellants and adoption deed is made. Therefore, to obtain appropriate order from the Court the application has been filed alongwith necessary documents before the trial Court praying therein that the appellants be appointed as legal guardian of minor female child of respondent named Bhakti who is born on 30.6.1999 and also prayed for issuance of guardian certificate to them under the provisions of the Act.

3. The respondent appeared before the learned Assistant Judge and filed reply at Ex.8 inter alia admitting all the assertions made by the appellants in their application and stated that he has no objection if the Court grants the prayer made by the appellants in their application. In support thereof the respondent has also filed affidavit at Ex.11. He has also asserted that the welfare of his child Bhakti is with the appellants because his wife has expired. He, therefore, prayed to grant the relief as prayed for by the appellants.

4. The learned Assistant Judge, Surat, dismissed the application filed by the appellants holding that the appellants have filed a joint application for appointing

them as guardian of minor female child Bhakti who is daughter of respondent. Besides this, the trial Court has also held that the appellants have produced adoption deed vide mark 3/9 and considering the contents of the said adoption deed, it cannot be said that the said adoption deed is valid as per the provisions of the Hindu Adoptions and Maintenance Act, 1956 ('the Hindu Adoptions Act' for short) because there is no provision in the Hindu Adoptions Act to take in adoption jointly for one child. Therefore, according to the learned trial Judge, the application was not maintainable and resultantly he has rejected the application which has given rise to instant appeal at the instance of the original applicants.

5. This Court has heard Mr. Jashwant Shah, learned advocate appearing on behalf of Mr. AM Dagli, learned advocate of the appellants and Mr. YV Vaghela, learned advocate of the respondent. This Court has also perused the averments made in the memo of appeal, the documents annexed therewith and the impugned order passed by the trial Court.

6. The following facts are not disputed by either party:

The appellants are husband and wife. The respondent's wife Dipaliben died on 8.3.2003 leaving behind her a female child named Bhakti. There is relation between the appellants and respondent. The appellants have two sons. The two sons of the appellant and the minor female child of respondent, all the three children are staying as brothers and sister from the very beginning. The appellants have adopted the respondent's minor female child Bhakti on 2.4.2003 by performing Dattak ceremony as per the customary rites. The respondent has asserted that the welfare of his child Bhakti is with the appellants as his wife has passed away. The respondent has also prayed that the application of the appellants may be allowed.

7. In these facts situation, the only question now calls for determination of this Court is as to what are the powers of the Court under section 7 of the Act. To decide the said question, it would be relevant to refer to section 7 of the Act which reads as under:

> "7. Power of the Court to make order as to guardianship.--(1) Where the Court is satisfied that it is for the welfare of a minor that an order should be made--

(a) appointing a guardian of his person or property or both, or

(b) declaring a person to be such a guardian

the Court may make an order accordingly.

(2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.

(3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act."

8. On having fair look at the aforesaid provision of the Act, it is clear that where the Court is satisfied that it is for the welfare of a minor that an order should be made appointing a guardian of his person or property or both, or declaring a person to be such a guardian, the Court may make an order accordingly. The learned trial Judge has misdirected himself by observing that considering the contents of the adoption deed which is produced at mark 3/9 the said adoption deed is not as per the provisions of the Hindu Adoptions Act as there is no provision to take in adoption jointly one child. According to this Court, the learned trial Judge has misread Section 11 of the Hindu Adoptions Act. As per the said provision if the adoption is of a son, the adoptive father or mother by whom the adoption is made must not have a Hindu son, sons's son or son's son's son leaving at the time of adoption and if the adoption is of a daughter, the adoptive father or mother by whom the adoption is made must not have a Hindu daughter or son's daughter living at the time of adoption. In instant case, the appellants have two sons and they wanted to adopt the female child of respondent. Therefore, the embargo placed under Section 11 of the Hindu Adoptions Act cannot come in the way of the appellants. Similarly, the learned trial Judge has also misread the provisions

of section 8 of the Hindu Adoptions Act. In aforesaid view of the matter, by virtue of the powers conferred under section 7 of the Act, the learned trial Judge ought to have granted the application. Therefore, the impugned order is passed on erroneous construction of the provisions of the Act and the Hindu Adoptions Act. The impugned order is, therefore, required to be quashed and set aside by allowing this appeal and thereby granting the application field by the appellants before the trial Court.

9. For the foregoing reasons, the appeal succeeds and is accordingly allowed with no order as to costs. The impugned order dated 1.4.2004 passed by the learned Assistant Judge, Surat, in Misc. Guardian Application No.40 of 2003 filed by the appellants herein is hereby quashed and set aside and resultantly the application filed by the appellants is accepted. The learned trial Judge is directed to issue certificate in terms of this order and as per the prayers made in the application filed by the appellants before him.

10. Since the appeal is allowed, no orders are required to be passed in Civil Application and hence the application stands disposed of and notice is discharged with no order as to costs.

Direct service is permitted.

(A.M. Kapadia, J.)

(karan)